Moreover, it is a reasonable surmise that the second appellant as proprietor of the business paid the rent. There is no evidence at all that the first appellant paid the rent himself. Why should he for business premises occupied and used by the second appellant? The subterfuge is clearly shown up if one asks who paid the rent for No. 45.

The other two grounds on which possession was claimed fall under paragraphs (f) and (n) of section 12(1) of the Ordinance. The finding of the learned president, with which I agree, disposed of the question of "other accommodation" and suitable alternative accommodation. All that the first appellant would have to do is to remove his bed and rejoin his wife in No. 40. The questions of reasonableness and comparative hardship have also been decided in favour of the respondent. He had been denied for almost twenty years the use of his own premises. The first appellant does not, as tenant, use the half portion of No. 45 for his own business. The appellants have space in one and a half shop houses to carry on their trade, the respondent has only half a shop. The law in my view should not lend its assistance to do an injustice.

I am of the view that the second appellant was properly made a party in ejectment proceedings. The first appellant had forfeited his right to continue as statutory tenant by giving up his business premises to his son.

As to costs, it is clear that the learned president had overlooked section 13 and his order for costs was not made in the exercise of his discretion. However, I feel certain that had he been reminded, his discretion would have been exercised in the respondent's favour. In any event, I propose to exercise my discretion to order the appellants to pay the costs of the action. On this point, I would refer to the case of *R.* v. *Cook*,[2] at p. 622, where Devlin J. (as he then was) said:—

"It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision. But in this case we are not satisfied that the learned chairman really exercised his discretion at all. He allowed the questions to be put because he thought that counsel was strictly entitled to do so, although he, the chairman, queried whether it was necessary. Accordingly, it falls to us to exercise our own discretion in the matter".

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Joseph & Son; Atma Singh Gill.*

NG FOOK HIONG v. ARUNACHALAM CHETTIAR

[A.C.J. (Ismail Khan J.) July 22, 1966]

[Seremban — Civil Appeal No. 2 of 1966]

Landlord and Tenant — Premises sublet by tenant — Default judgment against subtenant — Application to set aside judgment — Whether applicant has disclosed defence on merits.

Practice and Procedure — Default judgment — Setting aside — Consideration of defence on merits.

The respondent, the owner of controlled premises, brought an action claiming possession of a part of the premises occupied by the appellant. The appellant did not file any defence and did not appear at the trial, as she was unwell. Judgment in default was entered against her and she subsequently applied to set aside the judgment. The learned president of the sessions court refused to set aside the judgment as he said "besides failing to file a statement of defence, the applicant has no defence to contest the claim".

Held: the learned president should have considered whether the appellant in her application had disclosed a defence on the merits and as it was clear from her affidavit that she claimed to be a subtenant of the premises, the default judgment must be set aside.

Case referred to:—

(1) *Evans* v. *Bartlam* [1937] A.C. 473.

CIVIL APPEAL.

Edger Joseph Jr. for the appellant.

W. H. Sault (*John Ang Soon Ho* with him) for the respondent.

Cur. Adv. Vult.

Ismail Khan J.: The respondent, the owner of controlled premises known as No. 21, Lister Road, Kuala Pilah, (hereinafter called the premises) commenced an action in the sessions court at Kuala Pilah against the appellant claiming possession of a part of the premises, namely, half of the ground floor and one room in the front floor thereof (which part is hereinafter referred to as the said part) and damages for trespass.

The summons was served on the appellant on 16th May, 1964, but was not set down for hearing until 11th December, 1964. No defence was filed. On the day of the hearing the appellant failed to appear but had sent her sister to inform the court that she was unwell and to apply for a postponement which was refused.

The respondent then proceeded to prove his case. He said in evidence that he had obtained an order of ejectment against a tenant of the premises, one Kow Guan, early in 1963. I pause to observe that the order for possession was obtained as the tenant was in arrears of rent. On 20th February, 1963, the respondent received a notice from the appellant that she was a subtenant of the said premises. He replied that he could not recognise her as a sub-tenant as the former tenant, the sole occupant of the premises, was prohibited from subletting the premises or

any part thereof. The respondent produced his rent receipt at the back of which appears one of the terms of the tenancy agreement which is as follows:—

"The tenant is not entitled to sublet the premises without the written consent of the owner".

In the event, the learned president made an order giving possession of the said part to the respondent.

The appellant then applied to the learned president to set aside the default judgment on the grounds set out in her affidavit dated 19th December, 1964, namely, that she was ill on the day of the hearing of the summons, and further, that she had a good defence on the merits. It is not in dispute that this was a regular judgment. The principles by which the court should be guided in setting aside a default judgment are laid down in the case of *Evans* v. *Bartlam*,[1] where Lord Atkin said at page 480:—

"The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence.

. . . . . .

The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure".

The learned president, however, refused to set aside the judgment on the ground that "besides failing to file a statement of defence, the applicant has no defence to contest the claim". The fact that the appellant had failed to file a defence is not, in my view, wholly relevant to an application to set aside a default judgment. However, in coming to the conclusion that the appellant had "no defence to contest the claim", it would appear from his grounds of judgment that the learned president only took into consideration an exhibit to the appellant's affidavit, a document relating to the grant of the sub-tenancy of the said part and a rent receipt produced by the respondent purporting to contain the prohibition against the subletting of the premises. This, in my view, is a wrong approach, due to insufficient appreciation of the principle that in an application to set aside a default judgment the learned president had to consider if the applicant had disclosed a defence on the merits, that is, if she had a *prima facie* defence.

It is clear from the appellant's affidavit that she was taking the position that the former tenant, Kow Guan, had sublet the said premises to her in 1954 some years before the respondent took ejectment proceedings against him. She also claimed that the tenancy agreement between the respondent and Kow Guan did not preclude subletting and, in the alternative, that it did not prohibit subletting of part of the premises. She had therefore disclosed an issue to be tried. There was no counter-affidavit by the respondent. Even if there had been one, I do not see why at this stage the appellant should not be believed. As Lord Wright said in the case cited above, "The appellant here has an explanation, the truth of which is indeed denied by the respondent, but at this stage I see no reason why he should be disbelieved on what appears to me to be a mere conflict on affidavits".

In the result, I set aside the default judgment and order the case to be tried by a different president. The defence is to be filed within fourteen days of the date hereof. As a term for setting aside the default judgment, the appellant has to deposit a sum of $1,000 in court. The costs thrown away are to be paid to the respondent.

Appeal allowed.

Solicitors: *Joseph & Son; Sault, Keith Sellar & Co.*

C.C. LOKE v. S.H. BENSON (SINGAPORE) LTD.

[O.C.J. (Winslow J.) July 23, 1966]

[Singapore — District Court Appeal No. 4 of 1966]

Bailment — Action for wrongful detention of furniture — Counterclaim for storage rent.

The appellant occupied a flat at River Valley Road. In May 1963 he allowed *W.* an employee of the respondent company to use one bedroom and to share the expenses of the flat. The company supplied bedroom furniture for the use of *W.* *W.* moved out of the flat in August 1963 leaving the bedroom furniture behind. The appellant then made several telephone calls to the company to ask that the furniture be removed but nothing was done till January 1964 when the secretary of the company wrote to the appellant saying that the company would like to come to an amicable arrangement with him. Later the secretary saw the appellant and asked the appellant whether he would like to take the furniture for $100, which was considerably below its then market value. The appellant did not accept the offer and asked the secretary to have the furniture removed on payment of "storage rent". The appellant subsequently refused to allow the company to collect the furniture unless he was paid rent or compensation. The company thereupon issued a writ claiming the return of the furniture. The appellant counterclaimed for storage rent at $70 a month from September 1963 until judgment but did not specifically plead any lien. At the trial counsel for the appellant conceded that the company was entitled to recover the furniture. The learned district judge allowed the appellant the sum of $350 for storage rent and also assessed the damages for wrongful detention at $25 a month from February 6, 1964 till judgment, that is $525. The appellant appealed against the award of damages and the respondents counter-appealed against the award of storage rent.

Held: (1) there was no agreement in this case that any sum should be paid for storage charges and that the furniture should not be removed until such sum has